STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 27, 2005
V NEFTALI VILLEGAS, Defendant-Appellant.	No. 253447 Wayne Circuit Court LC No. 03-011037-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
V ERNEST CHAPMAN III, Defendant-Appellant.	No. 253512 Wayne Circuit Court LC No. 03-0111038-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
V QUENTIN JOHNSTON, Defendant-Appellant.	No. 254284 Wayne Circuit Court LC No. 03-001038-02

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

In these consolidated cases, defendants appeal by right their convictions and sentences arising out of a daytime business hours "smash and grab" theft of jewelry from a sales booth located at the Gibralter Trade Center in the city of Taylor. After a joint trial, the jury convicted

Defendant Villegas of unarmed robbery, conspiracy to commit unarmed robbery, and assault with a dangerous weapon (felonious assault). The jury convicted Defendant Chapman of unarmed robbery, conspiracy to commit unarmed robbery, and two counts each of assault intent to great bodily harm less than murder and assault with a dangerous weapon with respect to two victims. The jury convicted Defendant Johnston of the lesser offenses of larceny from a person and conspiracy to commit larceny from a person. We affirm defendants' convictions and sentences except Chapman's two convictions for felonious assault, which we vacate.

I. Sufficiency of the Evidence

The evidence at trial showed that Villegas used a hammer to smash a glass-covered display case; he and Chapman then fled with the exposed jewelry. Chapman used a box cutter to assault two victims to affect his escape with the stolen jewelry. Villegas swung the hammer at a victim but was apprehended. Johnston acted as the getaway driver, he drove the others to the trade center and waited for them. All three defendants confessed.

This Court reviews de novo claims that evidence at trial was insufficient to support a conviction. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). In evaluating such a claim**,** we must view the evidence in the light most favorable to the prosecution to determine whether a rational jury could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe,* 440 Mich 508, 515; 489 NW2d 478 (1992), modified 441 Mich 1201 (1992). This Court must not interfere with a jury's determination regarding the weight of the evidence or the credibility of the witnesses. *Id*. at 514-515. Indeed, we must to draw all reasonable inferences and make credibility choices that support the jury's verdict. *People v Nowack,* 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendants Villegas and Chapman argue that the evidence was insufficient to establish an unarmed robbery occurred because the theft was not by means of contemporaneous use of "force and violence, or by assault or putting in fear." MCL 750.530; *People v Randolph,* 466 Mich 532, 536; 648 NW2d 164 (2002).[1] We disagree. Defendants used a forceful and violent act in the immediate presence of others, smashing a glass display case, to obtain possession of the property they intended to steal. In addition, the manager of Golden Sun Jewelry at the Gibralter Trade Center testified that he was near the jewelry display case when Villegas shattered the glass with something hard; he testified the breaking of the glass caused him to fear for himself and his customer. Applying reasonable inferences, and resolving credibility conflicts in favor of the jury verdict, this evidence was sufficient to permit a rational jury to conclude that the stolen property was obtained through a forceful and violent act, or by placing others in fear. Either finding supports the jury's verdict. *People v Hearn,* 159 Mich App 275, 281; 406 NW2d 211 (1987).

[1] The instant offenses occurred after *Randolph* was decided but before the Legislature amended the unarmed robbery statute to provide that the element of force, violence, assault, or putting in fear is satisfied by "acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." MCL 750.530(2), 2004 PA 128, effective June 3, 2004.

Defendant Villegas advances no additional argument regarding his conspiracy conviction, so he has abandoned the claim. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Defendant Chapman argues the evidence to establish his conspiracy conviction was deficient because he did not admit to the police he intended to steal property by use of force, violence, assault, or placing a person in fear. Defendant's claim is without merit.

A criminal conspiracy exists when two or more persons reach an express or implied mutual understanding or agreement to accomplish a unlawful act. *People v Bettistea*, 173 Mich App 106, 117; 434 NW2d 138 (1988). Conspiracy requires proof of specific intent to both combine with others and to accomplish an illegal objective. *People v Justice (After Remand)*, 454 Mich 334, 345, n 18; 562 NW2d 652 (1997). But a conspirator need not "know the full scope of the conspiracy or participate in carrying out each detail, or that he was acquainted with each of his coconspirators or knew the exact part played by each of them." *People v Grant*, 455 Mich 221, 236, n 20; 565 NW2d 389 (1997). Because it is a clandestine crime, "direct proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties." *Justice, supra* at 347.

Here, although Chapman did not specifically confess to a prior agreement with others to commit the "smash and grab" robbery, eyewitnesses testified that he acted in concert with Villegas to commit the offense. "What the conspirators actually did in furtherance of the conspiracy is evidence of what they had agreed to do." *People v Hunter*, 466 Mich 1, 9; 643 NW2d 218 (2002). Further, Chapman's statement includes admissions that the offense was planned in advance. Accordingly, the "circumstances, acts, and conduct of the parties" when viewed in a light most favorable to the prosecution were sufficient for a rational jury to find beyond a reasonable doubt that defendant conspired with Villegas to commit the "smash and grab" robbery. *Id*. at 6; *Justice, supra* at 347.

Chapman also argues that he assaulted two victims with a box cutter only to escape, not simply to cause great bodily harm. This argument has no merit.

To establish the crime of assault with intent to commit great bodily harm less than murder requires the prosecution must prove the accused: (1) attempted or threatened with force or violence to do corporal harm to another (an assault), and (2) intended to do great bodily harm less than murder. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Intent may be proved by any facts in evidence; minimal circumstantial evidence is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Here, the jury had before it evidence that Chapman used and attempted to use a sharp cutting instrument on vital areas of two victims, resulting in life threatening injuries to one. This evidence, when viewed in a light most favorable to the prosecution, was more than adequate for a rational jury to find beyond a reasonable doubt that defendant assaulted the two victims with the intent to do great bodily harm less than murder. *Wolfe, supra* at 514-515. Despite defendant's argument, it is the jury that determines what inferences to be drawn from the evidence and the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). This Court draws all reasonable inferences that support the jury's verdict. *Nowack, supra* at 400.

Defendant Johnston argues the evidence did not establish that he specifically intended to assist the commission of larceny from a person because he only agreed to assist larceny in a building by performing a "smash and grab" theft. We disagree.

The elements of larceny from a person are (1) the taking of someone else's property without consent, (2) movement of the property, (3) with the intent to steal property, and (4) the property was taken from the person or from the person's immediate area of control or immediate presence. *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004). From defendant's knowledge of and agreement to assist a business hours theft from a retail trade center, it is reasonable to infer that Johnston knew that his codefendants would steal property in the presence of people, including retailers, customers, and innocent bystanders, and then run away. Viewing the evidence and reasonable inferences in the light most favorable to the prosecution a rational jury could have found that all of the essential elements of the crimes of larceny from a person and conspiracy to commit larceny from a person were proven beyond a reasonable doubt. *Nowack, supra* at 400.

Although Johnston also asserts the jury's verdict was against the great weight of the evidence, he advances no meaningful argument in that regard. Accordingly, he has abandoned that claim. *Harris, supra* at 50.

II. Trial Issues (No. 254284)

A. Jury Instructions

Johnston first argues that because he was charged with unarmed robbery and conspiracy to commit unarmed robbery, the trial court erred by instructing the jury it could consider the uncharged crimes of larceny from a person and conspiracy to commit larceny from a person.

Johnston failed to object to the trial court's jury instructions, and therefore, has waived error unless relief is necessary to avoid manifest injustice. MCL 768.29; *People v Carines*, 460 Mich 750, 767; 597 NW2d 130 (1999). MCL 768.32(1) determines whether a trial court may instruct the jury on an uncharged lesser offense. *People v Cornell*, 466 Mich 335, 353-357; 646 NW2d 127 (2002). "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Id*. at 357. The statute only permits instructions on necessarily included lesser offenses, not cognate lesser offenses. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002).

Contrary to defendant's argument, larceny from a person is a necessarily included lesser offense of unarmed robbery. As this Court recently noted, "the lack of force or violence distinguishes larceny from a person from the offense of robbery." *Perkins, supra* at 272. For the same reason, conspiracy to commit larceny from a person is a necessarily included lesser offense of conspiracy to commit unarmed robbery. *People v Beach*, 429 Mich 450, 484, n 17; 418 NW2d 861 (1988). Thus, because the charged greater offense of unarmed robbery required the jury to find the disputed factual element of force and violence, or assault, or putting in fear, which is not part of the lesser included offense of larceny from a person, and a rational view of the evidence supported the lesser offense, the trial court did not err in instructing the jury on the lesser included offense.

B. Prosecutorial Misconduct

Next, Johnston claims that the prosecutor denied him a fair trial by (a) improperly appealing to jury sympathy and bolstering the credibility of the complainants by asking during voir dire if jurors could remember events involving a "near death experience", (b) arguing without evidentiary support that one of his codefendants possessed a gun and, (c) arguing a theory of aiding and abetting unsupported by law by asserting Johnston continued to aid and abet Chapman until the two were arrested.

This Court reviews claims of prosecutorial misconduct case by case to determine whether, in context, the alleged improper remarks denied the defendant a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). When, as here, the defendant fails to preserve his claim of misconduct by contemporaneous objection and request for a curative instruction, our review is limited to plain, outcome-determinative error that results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of the guilt or innocence of the accused. *Carines, supra* at 763-764; *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Johnston's claim that the prosecutor appealed to jury sympathy and bolstered the credibility of the prosecutor's witnesses is without merit. A prosecutor may not appeal to the jury to sympathize with victims, *Watson, supra* at 591, nor vouch for the credibility of his witnesses on the basis of "special knowledge" withheld from the jury, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). But the prosecutor's questions here do not fall neatly into either category of improper remarks, and defendant cites no specific authority supporting his claim. We find nothing improper in an attorney's probing the attitude of prospective jurors regarding the impact certain events might have on the credibility of prospective witnesses. In any event, the prosecutor's remarks were not plainly improper. *Callon, supra* at 329. Further, the trial court instructions to the jury regarding its role in determining witnesses' credibility and other general trial instructions, including how to assess comments by attorneys, cured any potential prejudice. *Id*. at 331; *Bahoda, supra* at 281.

The record does not support Johnston's claim that the prosecutor improperly argued without evidentiary support that one of his codefendants possessed a gun. One witness at trial testified that she saw a black object at the waist of one of the defendants, which she thought was a gun. The prosecutor may properly argue the evidence and reasonable inferences from the evidence. *Id*. at 282. Misconduct did not occur here. *Callon, supra* at 330.

Last, Johnston argues that the prosecutor misstated the law of aiding and abetting. The prosecutor's brief remark did not deny defendant a fair trial in the context of the entire trial and instructions of the trial court. *Watson, supra* at 586. The trial court instructed the jury that an attorney's comments are not evidence, and that anything an attorney might say about the law contrary to the court's instructions should not be followed. "Juries are presumed to follow their instructions." *People v Rodgers*, 248 Mich App 702, 717; 645 NW2d 294 (2001). The trial court's instruction eliminated any possible prejudice. *Bahoda, supra* at 281.

C. Confrontation Clause

Johnston argues that his Confrontation Clause rights were violated by the admission of Villegas's redacted confession, relying on *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Johnston contends that, in context, the statement clearly pointed to him as the getaway driver. Because Villegas did not testify at trial, Johnston asserts he was denied his constitutional right of cross-examination. Johnston did not raise this issue below, so our review is for plain error affecting his substantial rights. MRE 103(d); *Carines, supra* at 763-764.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion but questions of law on which alleged error is based are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The Sixth Amendment's confrontation guarantee is applied to state prosecutions through the Fourteenth Amendment's Due Process Clause. *Crawford, supra* at 42. The Supreme Court in *Crawford* held that the Confrontation Clause does not permit the admission of ex parte "testimonial" statements, not precisely defined but including statements ensuing from police interrogation, unless the accused has had a prior opportunity for cross-examination and the declarant is unavailable. "Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id*. at 68.

We agree with the prosecutor that *Crawford* is not directly applicable because Villegas's statement was not admitted as substantive evidence against the other defendants. The statement was redacted to eliminate any facial reference to other defendants, and the trial court repeatedly instructed the jury that it was substantive evidence only against the maker of the statement. Although *Crawford* overruled prior cases addressing admissibility of hearsay,[2] it did not overrule *Richardson v Marsh*, 481 US 200; 107 S Ct 1702; 95 L Ed 2d 176 (1987), which held that the "Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id*. at 211. *Marsh* did not address redaction, as here, with neutral pronouns, but in such cases the issue is whether despite the redactions and cautionary instructions there remains a substantial risk that the jury will use the nontestifying confessing defendant's statement against a codefendant. *People v Banks*, 438 Mich 408, 421; 475 NW2d 769 (1991). This determination is made on a case by case basis in light of the circumstances and other evidence in the case. *Id*. That other evidence may link a defendant to the nontestifying codefendant's statement is by itself insufficient to violate the Confrontation Clause. *Marsh, supra* at 208. Rather, the linkage must be so great and the codefendant's statement so powerfully incriminating, that the presumption jurors would follow the trial court's limiting instructions is overcome. *Id*.; *People v Frazier (After Remand)*, 446 Mich 539, 562-563; 521 NW2d 291 (1994).

We conclude Villegas's statement did not powerfully incriminate defendant so as to overcome the presumption that the jury would follow the trial court's limiting instructions.

[2] Notably, *Crawford* overruled *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980) with respect to "testimonial" statements.

Rodgers, supra at 717. The circumstances in the present case are simply unlike those in *Banks* where the redacted codefendants' statements at a joint trial left "no doubt" that the third person in the statements referred to the defendant. *Banks, supra* at 423. Accordingly, the trial court did not plainly err by admitting the redacted statement with repeated instructions the statement was admitted only against its maker. *Carines, supra* at 764. Even if plain error occurred, Johnston has not met his burden of proving the error was prejudicial in light of his own confession and other properly admitted evidence. *Id*. at 763.

D. Search and Seizure

Johnston next argues that the trial court erred by not suppressing evidence related to the Neon titled to his father. He argues the car was seized without warrant, or exigent circumstances, or probable cause, while legally parked near the Johnston residence. Johnston also argues that the trial court erred by admitting evidence of bloodstains found inside the Neon. The essence of Johnston's argument is that at the time of its seizure the police only possessed reasonable suspicion, not probable cause to believe the car was or contained evidence of a crime, and no justification existed for the police failing to obtain a search warrant once suspicion ripened to full probable cause. This argument lacks merit.

Most of the evidence about the Neon was properly admitted independent of its seizure. See *People v Smith*, 191 Mich App 644, 648-649; 478 NW2d 741 (1991) (the exclusionary rule does not apply where the police obtain evidence from an independent source, including evidence discovered in plain view before any illegality). The police observation or photographs of the Neon's exterior did not result from a search or seizure within the meaning of the Fourth Amendment or Const 1963, art 1, § 11. The constitutional protections against unreasonable searches and seizures are only implicated when the government infringes a person's reasonable expectation of privacy. *People v Jones*, 260 Mich App 424, 428-429, 429; 678 NW2d 727 (2004). Defendant can have no reasonable expectation of privacy in the exterior of an automobile or its registration plate because they are in plain view. *Id*. Thus, the police did not obtain official records about the Neon as a result of a "search". *Id*. at 427-428. Even if the subsequent police seizure was illegal, police observations before the seizure are not subject to suppression. *Smith, supra.*

Johnston's argument that evidence of bloodstains in the Neon should have been suppressed also fails. Generally, the Fourth Amendment requires the police to obtain a search warrant before seizing evidence of a crime. *People v Levine*, 461 Mich 172, 178; 600 NW2d 622 (1999). But because of its mobility, a search of an automobile is an exception to this general rule; an automobile may be seized or searched without a warrant when the police have probable cause to believe that it may contain or be evidence of a crime. *Id*. at 179; *People v Carter*, 250 Mich App 510, 515; 655 NW2d 236 (2002).

Johnston argues the police seized the Neon when they only had reasonable suspicion, not full probable cause. The prosecution argues Johnston lacks standing to challenge the Neon's seizure because defendant's father owned it. It is unnecessary to remand this case for an evidentiary hearing to determine whether defendant can establish standing to challenge the police seizure or whether the police developed full probable cause before doing so. The police seized the Neon on the same day that Johnston confessed, which would surely have provided the police with probable cause to believe the Neon was used as the getaway car and may contain evidence.

Michigan recognizes the inevitable discovery doctrine as an exception to the exclusionary rule to admit tainted evidence that ultimately would have been obtained in a constitutionally accepted manner. *People v Stevens (After Remand)*, 460 Mich 626, 637; 597 NW2d 53 (1999). "The inevitable discovery exception generally permits admission of tainted evidence when the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been revealed in the absence of police misconduct." *Id*. The doctrine presents three concerns: (1) are the lawful means truly independent, (2) are both the use of the lawful means and the discovery by that means truly inevitable and, (3) does applying the inevitable discovery exception either encourage police misconduct or significantly weaken the protection of the Fourth Amendment? *People v Brzezinski*, 243 Mich App 431, 436; 622 NW2d 528 (2000). These concerns are satisfied here because Johnston does not argue the Neon's seizure contributed to his confession or that it would not have been available for seizure after he confessed. Indeed, he argues no exigent circumstances existed to justify the police seizure without obtaining a search warrant. But the police may search a vehicle on the basis of probable cause without a warrant even if the vehicle has been impounded and is in police custody. *People v Wade*, 157 Mich App 481, 486; 403 NW2d 578 (1987). So, the evidence was properly admitted; plain error affecting Johnston's substantial rights did not occur. *Carines, supra*.

E. Assistance of Counsel

Johnston claims he was denied a fair trial because his trial counsel (a) failed to investigate and call character witnesses to testify to his law-abiding and peaceful reputation, (b) failed to object to improper juror voir dire, (c) did not object to the trial court instructing the jury on the lesser offenses, (d) did not object to the admission of Villegas's redacted statement to the police, (e) did not move to suppress evidence related to the Neon and, (f) conceded during closing argument that Johnston was guilty of larceny from a person without prior consent. Johnston also requests that we remand this case to the trial court for a *Ginther*[3] hearing.

We review de novo whether the assistance of counsel provided in a particular case meets the constitutional standard of assuring the accused a fair trial. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Effective assistance is presumed, and defendant bears a heavy burden to prove otherwise. *Rodgers, supra* at 714. In order to overcome the presumption, defendant must first show that under the circumstances counsel's performance was deficient as measured against objective reasonableness according to prevailing professional norms. *Id*. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional error(s) the trial outcome would have been different. *Id*.

Regarding Johnston's arguments a, b, c, and d, counsel's failure to object or move to suppress evidence would have been futile. *Id*. at 715. Further, counsel's not calling character witnesses would not likely have resulted in a different trial outcome in light of the overwhelming evidence of defendant's guilt. Accordingly, Johnston has failed to overcome the presumption of effective assistance of counsel. *Id*. at 714-715; *People v Toma*, 462 Mich 281, 302-303; 613

[3] *People v Ginther*, 390 Mich 436, 442; 212 NW2d 922 (1973).

NW2d 694 (2000) (a defendant must establish a reasonable probability that, but for counsel's deficient performance, the trial outcome would have been different).

The record does not support Johnston's claim that counsel conceded his guilt. Rather, counsel argued Johnston and his codefendants were overcharged and that the evidence was insufficient to overcome reasonable doubt as to Johnston's guilt. Counsel also addressed the lesser included offenses of larceny from a person and conspiracy larceny from a person, noting that the lesser offenses were "closer to the truth of what these individuals did," and that the jury might agree. Nevertheless, counsel argued the evidence of Johnston's mental state was insufficient to establish his guilt as to the lesser offenses, that "mere presence" when others committed crimes was insufficient, and suggested to the jury that Johnston's poor judgment did not rise to the level of criminal culpability.

Moreover, a defense counsel arguing that a defendant is guilty of a lesser offense is not necessarily ineffective assistance of counsel. *People v Savoie,* 419 Mich 118, 134-135; 349 NW2d 139 (1984). When, as in this case, the evidence of guilt is substantial, arguing that the evidence only establishes a lesser offense is reasonable trial strategy. *People v Wise,* 134 Mich App 82, 98; 351 NW2d 255 (1984). Consequently, Johnston has failed to overcome the presumption that counsel was constitutionally adequate. *Rodgers, supra* at 714.

F. Cumulative Error

Johnston also argues that the cumulative effect of trial errors requires reversal because combined they denied him due process. We disagree. Several actual trial errors that standing alone would not warrant reversal may combine to deny an accused a fair trial. *LeBlanc, supra* at 591, n 12. Here, Johnston has not identified any errors resulting in prejudice. Consequently, without any unfair prejudice from actual errors, there can be not cumulative effect to deny defendant a fair trial. *Id*.; *People v Knapp,* 244 Mich App 361, 387-388; 624 NW2d 227 (2001).

III. Sentence Guidelines Issues

A. Docket 253447

Villegas argues that the trial court incorrectly scored offense variables (OV), relying primarily on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) and *Apprendi v New Jersey,* 530 US 466, 490, 147 L Ed 2d 435, 120 S Ct 2348 (2000). Villegas preserved these arguments by objecting at the sentencing proceeding on the same basis he now raises on appeal. MCR 6.429(C); MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Our review is de novo because the proper interpretation and application of the legislative sentencing guidelines and defendant's constitutional challenge to the guidelines scoring are questions of law. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

First, Villegas argues that basing his offense variable scores on conduct of his codefendant for which Villegas was not convicted or which he did not admit violates his constitutional right to a have a jury determine beyond a reasonable doubt, any fact, other than that of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum. *Blakely, supra*, 124 S Ct at 2536, citing *Apprendi, supra* at 490. But our Supreme Court has already held that *Blakely* does not affect Michigan's sentencing guidelines scheme, in

which prior record variables and offense variables are utilized to arrive at a recommended range for a minimum sentence of an indeterminate sentence, the maximum of which is set by statute and jury verdict. *People v Claypool*, 470 Mich 715, 730 n 14 (Taylor, J.), 732 (Corrigan, C.J.), 744 (Weaver, J.), 744 n 1 (Young, J.); 684 NW2d 278 (2004). *Claypool* is binding on this Court.[4] *People v Wilson*, 265 Mich App 386, 399; 695 NW2d 351 (2005); *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881; 693 NW2d 823 (03/31/05).

Blakely and *Apprendi* applied the Sixth Amendment right to trial by jury to the states through the Due Process Clause of the Fourteenth Amendment. As Justice Scalia explained in *Blakely*, indeterminate sentencing does not impinge this right because a defendant has no right to a sentence less than the maximum set by law. *Blakely, supra*, 124 S Ct at 2540. Thus, Justice Scalia distinguished *McMillan v Pennsylvania*, 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986), and *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002), both of which approved judicial fact finding to arrive at a mandatory minimum sentence. *Blakely, supra*, 124 S Ct at 2538. In contrast to sentence guidelines schemes setting a maximum determinate sentence, Michigan's sentence guidelines operates to determine a range for a minimum sentence as part of an indeterminate sentence with the maximum set by law. Consequently, Villegas's constitutional argument fails. *Claypool, supra* at 730 n 14.

Villegas also argues with respect to OV 1, 2, and 3, that he cannot be considered a multiple offender within the meaning of MCL 777.31(2)(b), MCL 777.32(2), and MCL 777.33(2)(a), because he was not convicted of aiding and abetting Chapman commit the offense of assault with a intent to do great bodily harm. This argument is inconsistent with the plain meaning of statutory language at issue, which requires that "[i]n multiple offender cases, if [one] offender is assessed points . . . , all offenders shall be assessed the same number of points." In applying this plain language in *Morson, supra* at 259 n 11, our Supreme Court observed:

> [T]here is no language in either statute [MCL 777.31(2)(b), OV 1, and MCL 777.33(2)(a), OV 3] to suggest that the multiple offender provision applies only when "offenders" are charged with identical crimes. Thus, the fact that Northington was charged with additional crimes - - namely, assault with intent to murder - - does not mean that the multiple offender provisions do not apply to the armed robbery convictions arising from the incident.

The trial court's scoring of OV 1, 2, and 3, is also consistent with traditional principles of accomplice and conspirator culpability. Villegas and Chapman were each convicted of unarmed robbery and conspiracy to commit unarmed robbery. Both defendants committed an assault with a weapon while attempting to escape with stolen property. Their common plan clearly included

[4] The United States Supreme Court subsequently applied *Blakely-Apprendi* to the federal sentencing guidelines, finding no distinction of constitutional significance between them and Washington's determinate sentencing scheme. *United States v Booker*, ___ US ___; 125 S Ct 738, 749; 160 L Ed 2d 621 (2005). Consequently, *Booker* does not affect the analysis of this issue. See *People v Dewald*, ___ Mich App ___; ___ NW2d ___ (#251804, rel'd 5/12/05, pub'd 7/14/05) slip op p 6.

the possibility of committing an assault with a dangerous weapon. "[E]ach conspirator is held criminally responsible for the acts of his associates committed in furtherance of the common design, and, in the eyes of the law, the acts of one or more are the acts of all the conspirators." *Grant, supra* at 236.

Villegas's argument regarding OV 9 is specious. MCL 777.16y categorizes unarmed robbery as a crime against a person. MCL 777.22(1), in pertinent part, directs trial courts: "For all crimes against a person, score offense variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19, and 20." MCL 777.39 instructs trial courts how to score OV 9. The plain language of the statute requires the trial court to count as a victim "each person who was placed in danger of injury or loss of life as a victim." MCL 777.39(2)(a); *People v Kimble*, 252 Mich App 269, 274; 651 NW2d 798 (2002). Victims include innocent bystanders who come to the aid of a robbery victim or who attempt to apprehend the robber. *Morson, supra* at 262-263, 277. In this case, at least two people were "placed in danger of injury or loss of life" by the commission of the unarmed robbery because the conspirator-robbers assaulted three people. In addition, financial victims come within the parameters of OV 9. *People v Knowles*, 256 Mich App 53, 62; 662 NW2d 824 (2003). There were one or more financial victims as a direct result of the robbery because a merchant's display case was smashed and the stolen jewelry was pawned. Finally, MCL 777.39(2)(b) applies only to homicide cases. The trial court correctly scored OV 9 ten points.

B. Docket 254284

Johnston's constitutional sentence guidelines claim fails for the same reason as Villegas's claim. *Claypool, supra* at 730 n 14, 732, 744. Johnston has abandoned any other constitutional claims by failing to meaningfully brief or support them with authority. *Harris, supra* at 50.

Moreover, Johnston was properly sentenced for offenses for which he was convicted. The plain language of the statutory guidelines controls sentence guidelines scoring of multiple offenders even when they are convicted of different offenses. *Morson, supra* at 259-260, n 11. Further, this Court will uphold the trial court's guidelines scoring when adequately supported by evidence. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 870 (2003). Because the trial court's scoring of offense variables was based on accurate information, and adequately supported by evidence, we uphold the trial court's scoring decisions.

The trial court correctly scored OV 9 ten points for the same reasons discussed with respect to Villegas's claim. Johnston argues that he did not intend there be two or more victims, but he conflates the element of scienter necessary for a criminal conviction with process due at sentencing. The jury found Johnston possessed the mental state necessary to be convicted of the offenses for which he was sentenced. Because his sentence was based on accurate information, due process was satisfied. *People v Williams*, 215 Mich App 234, 236; 544 NW2d 480 (1996).

IV. Double Jeopardy (Docket 253512)

Chapman was convicted and sentenced for both assault with intent to great bodily harm and felonious assault as to each of two victims he assaulted with a box cutter while escaping with stolen property. He argues that two convictions for one assault on a single victim violate constitutional double jeopardy protections. We agree.

We review de novo a constitutional claim that multiple convictions arising out of the same temporal assault on a single victim violates the constitutional protection against double jeopardy. *People v Ford*, 262 Mich App 443, 446; 687 NW2d 119 (2004). Both the federal and Michigan constitutional provisions against double jeopardy protect against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense. *Id*. at 447. "Judicial examination of the scope of double jeopardy protection against imposed multiple punishment for the 'same offense' is confined to a determination of legislative intent." *People v Sturgis*, 427 Mich 392, 400; 397 NW2d 783 (1986). This is because "the Double Jeopardy Clause acts as a restraint on the prosecutor and the courts, not the Legislature." *People v Robideau*, 419 Mich 458, 469; 355 NW2d 592 (1984). Consequently, when "'it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end[.]'" *Sturgis, supra* at 400, *Ohio v Johnson*, 467 US 493, 499, n 8; 104 S Ct 2536; 81 L Ed 2d 425 (1984).

The federal test to determine whether the Legislature intended to impose multiple punishments for the violation of more than one statute during the same transaction or incident is the so-called "same-elements" test.[5] *Ford, supra* at 448. This test "inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution." *United States v Dixon*, 509 US 688, 696; 113 S Ct 2849; 125 L Ed 2d 556 (1993). Because both felonious assault and assault with intent to do great bodily harm each contain an element the other does not, they survive the "same-elements" test. But the inquiry is not over because the "same-elements" test creates only a presumption the Legislature intended multiple punishments, which can be overcome by clear evidence to the contrary. *Ford, supra* at 448.

Under Michigan's Constitution, determining the Legislature's intent is a matter of statutory construction, involving traditional considerations of the subject, language and history of the statutes. *People v Denio*, 454 Mich 691, 708; 564 NW2d 13 (1997). A court should consider whether each statute prohibits conduct violative of a social norm distinct from the norm protected by the other, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, the elements of each offense, and any other factors indicative of legislative intent. *Id*. Particularly instructive here, our Supreme Court has opined:

> A further source of legislative intent can be found in the amount of punishment expressly authorized by the Legislature. Our criminal statutes often build upon one another. Where one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes. The Legislature has taken conduct from the base statute, decided that aggravating conduct deserves additional punishment, and imposed it accordingly, instead of imposing dual convictions. [*Robideau, supra* at 487-488.]

[5] See *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932).

The Legislature has made assault the base offense and has assigned increasingly greater penalties when more serious conduct accompanies the offense. For example, "a person who assaults or assaults and batters an individual," may be punished "by imprisonment for not more than 93 days or a fine of not more than $500.00, or both." MCL 750.81. But when a person assaults another and causes "serious or aggravated injury," the offense is "punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both." MCL 750.81a. A person committing felonious assault "with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon" may be punished "by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both." MCL 750.82. And, when one commits an assault with the intent do "to do great bodily harm," MCL 750.84, the maximum penalty increases to ten years imprisonment. One who commits an assault "with intent to commit the crime of murder" could be sentenced to life or any number of years in prison. MCL 750.83. All of these assault offenses violate the same social norm: the right of people to be free from being threatened with physical injury or actually being injured by another. Thus, the hierarchal nature of the punishments for escalating violations of the same social norm evidences that the Legislature intended a single punishment be imposed depending upon the seriousness of the conduct at issue. *People v Herron*, 464 Mich 593, 606; 628 NW2d 528 (2001).

The Legislature's intent to impose a single penalty for a single temporal assault on a single victim perpetrated with a dangerous weapon but with intent to do great bodily harm, is further found in the plain language of the statutes. The Legislature is presumed to have to have intended the meaning it plainly expressed. *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). Pertinent to the present case, the Legislature has defined felonious assault as occurring when "a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon *without intending to commit murder or to inflict great bodily harm less than murder*." MCL 750.82 (italics added). While the italicized part of the statute is not an element necessary to prove the crime of felonious assault, *People v Doss*, 406 Mich 90, 99; 276 NW2d 9 (1979), it indicates the Legislature's clear intent that a single assault with a dangerous weapon with the intent to inflict great bodily harm not result in a conviction for both felonious assault and assault with intent to do great bodily. So, defendant's convictions for both felonious assault and assault with intent to do great bodily arising out of a single temporal assault upon a single victim violate Michigan's Double Jeopardy Clause. Const 1963, art 1, § 15; *Herron, supra* at 606; *Robideau, supra* at 487-488.

When multiple convictions violate the double jeopardy protection against multiple punishments for the same offense, affirming the conviction of the higher charge and vacating the lower conviction is the appropriate remedy. *Herron, supra* at 609. Consequently, Chapman's two convictions and sentences for felonious assault must be vacated.

V. Conclusion

We affirm all defendants' convictions and sentences, except Chapman's two convictions for felonious assault, which we vacate.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane E. Markey